IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-879

THOMAS E. ZABLOCKI, Milwaukee County Clerk, individually, in his official capacity, and on behalf of all persons similarly situated,

Appellants,

vs.

ROGER G. REDHAIL, individually and on behalf of all persons similarly situated,

Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

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## MOTION TO AFFIRM

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## MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed on the ground that the questions are so insubstantial as not to warrant further argument.

## STATEMENT

This is a direct appeal from the final judgment and decree entered on August 31, 1976, by order of a three-judge District Court, declaring Sec. 245.10 (1), (4) and (5), WIS. STATS. (1973) unconstitutional and enjoining its enforcement.

On May 12, 1972, appellee Roger G. Redhail was adjudged by the Milwaukee County Court, Civil Division, to be the father of a child born out of wedlock. He was ordered to pay $109 per month as support until the child reaches eighteen years of age, plus court costs.

At the time of his admission of paternity, Redhail was a minor and a high school student. From May, 1972, until August, 1974, he was unemployed, indigent, and unable to pay any support. He therefore made no payments and as of December 24, 1974, there was an arrearage in excess of $3,732.

Redhail's child has been a public charge since birth and receives AFDC benefits in excess of $109 per month. Therefore, the child would be a public charge even if Redhail were current in his court ordered support payments.

On September 27, 1974, Redhail filed an application for a marriage license with appellant Thomas E. Zablocki. Zablocki is the County Clerk of Milwaukee County and therefore is responsible for the issuance of marriage licenses in Milwaukee County. Sec. 245.05, WIS. STATS. (1973). On September 30, 1974, Redhail was denied a marriage license by an agent of Zablocki solely because he



did not have a court order granting him permission to marry as required by Sec. 245.10 (1), WIS. STATS.

Under Sec. 245.10 (1), WIS. STATS., persons who have minor issue not in their custody which they have been ordered to support may not be issued a marriage license unless a court grants them permission to marry. Permission to marry must be withheld unless the marriage license applicant submits proof that s/he has complied with the support order and that the issue is not likely to become a public charge.[1] Appellee Redhail was unable to submit such proof and therefore could not obtain permission to marry. Redhail did not petition the state court for permission to marry.

The complaint in this action was filed December 24, 1974. The three-judge court was convened pursuant to 28 U.S.C. Sec. 2284 on January 6, 1975. Notice was given to the Governor and the Attorney General as required by 28 U.S.C. Sec. 2284 (2), and the appellant subsequently filed his answer.

On February 18, 1975, appellee filed a motion seeking to have the action maintained as a class action on behalf of all persons subject to the provisions of Sec. 245.10, WIS. STATS., and against a class consisting of all county clerks in the State of Wisconsin. On February 20, 1975, the action was certified as a class action pursuant to Rule 23(b) (2), Federal Rules of Civil Procedure, on

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[1] Section 245.10 (1), (4), and (5), WIS. STATS. are set forth in appellants' Jurisdictional Statement, pp. 3-4.

behalf of the class of appellees.[2] The order of February 20, 1975, also established a briefing schedule on the issue of the certification of the appellant class. Appellees filed a brief in support of the motion; appellant Zablocki did not file a brief in opposition.

A stipulation of facts and briefs on the merits were filed, and oral argument was held on June 23, 1975. On August 31, 1976, the action was certified by the District Court as a class action against the appellant class of county clerks pursuant to Rule 23(b) (2).[3] In the same decision, the District Court declared Sec. 245.10 (1), (4), and (5), WIS. STATS., unconstitutional under the Equal Protection Clause

[2] The appellee class is defined as follows:

"All Wisconsin residents who have minor issue not in their custody and who are under an obligation to support such minor issue by any court order or judgment and to whom the county clerk has refused to issue a marriage license without a court order, pursuant to Sec. 245.10 (1), WIS. STATS."

[3] The appellant class is defined as follows:

"All county clerks within the State of Wisconsin, all of whom are required by Sec. 245.10 (1), WIS. STATS., to refuse to issue marriage licenses to the class of plaintiffs without court order."



of the Fourteenth Amendment to the United States Constitution, and enjoined its enforcement by appellant county clerks. Appellant Zablocki was ordered to mail a copy of the opinion, order and judgment to all members of the class he represents.

## ARGUMENT

### I. THE DISTRICT COURT WAS CLEARLY CORRECT IN HOLDING THAT SEC. 245.10, WIS. STATS. (1973), VIOLATES APPELLEES' RIGHTS TO EQUAL PROTECTION OF THE LAW.

This case does not involve the impact of the equal protection clause on state marriage laws in general. It involves the impact of the equal protection clause on a marriage regulation peculiar to the State of Wisconsin. All states regulate such matters as the age, health, and competency of persons wishing to marry as well as the form essential to create the marriage relation. The decision below does not question the power of the states to do so. The marriage regulation at issue here is quite different. The State of Wisconsin has enacted legislation which divides unmarried, competent, healthy adults into two groups and substantially burdens and often denies the right of one group to marry. The District Court was plainly correct in holding that this particular regulation violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

In order for a member of the burdened class to lawfully marry, in Wisconsin or elsewhere,

the statute requires that s/he first obtain a court order granting permission to marry.[4] To obtain such permission, class members are required to make a financial disclosure to the court and to undergo the expense and delay of the statutory procedure.[5] Many class members, including appellee Roger Redhail, are unable to meet the statutory standards for the granting of permission and are therefore completely denied the right to marry.

The District Court subjected this statutory classification to "strict judicial scrutiny" and determined that Sec. 245.10, WIS. STATS., violates the equal protection clause.

Appellants argue that the District Court erred in applying the "strict scrutiny" test rather than the less stringent "rational basis" test. Jurisdictional Statement, pp. 8-9. However, where a

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[4] None of the county clerks in Wisconsin, the appellant class, may issue a marriage license to appellees without a court order. Burdened appellee class members who wish to marry outside the State of Wisconsin must first obtain permission from a Wisconsin court. Sec. 245.10 (4), WIS. STATS. Failure to comply with the requirements of the statute results in a void marriage. Sec. 245.10 (5), WIS. STATS., and criminal penalties, Sec. 245.30 (1) (f), WIS. STATS.

[5] To obtain a court order granting permission to marry, a class member must first file a verified petition with one of several courts. The court then schedules a hearing at which both parties to the proposed marriage must appear. Notice of the hearing must be given to the custodian of the minor



statutory classification interferes with a fundamental right or operates to the disadvantage of a suspect class, this Court's equal protection analysis requires that the strict scrutiny test be applied. Massachusetts Board of Retirement v. Murgia, ____U.S. _____, 96 S. Ct. 2562, 2566, (1976); Roe v. Wade, 410 U.S. 113, 155 (1973); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

In decisions spanning over fifty years, this Court has made it clear beyond argument that the right to marry is a fundamental right, one which is encompassed by, and perhaps basic to, the right of personal privacy guaranteed by the United States Constitution. "Marriage is one of the 'basic civil rights of man', fundamental to our very existence and survival." Loving v. Virginia, 388 U.S. 1, 12 (1967). See also Roe v. Wade, supra, 410 U.S. at 153; Paul v. Davis, 424 U.S. 693, 712-713 (1976);

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(con't footnote 5)

issue. If the minor issue was born of a previous marriage, the family court commissioner of the county where permission is being sought and of the county where the divorce was granted must also be notified. At the hearing, the marriage license applicant must prove compliance with the prior support order and must also prove that the children "are not then and are not likely thereafter to become public charges." The statute gives the court no discretion. If the applicant submits the required proof, permission must be granted; if the applicant is unable to submit such proof, permission must be withheld. Sec. 245.10 (1), WIS. STATS.

United States v. Kras, 409 U.S. 434, 444 (1973); Griswold v. Connecticut, 381 U.S. 479, 486, 495 (1965); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).[6] It is apparent that Sec. 245.10, WIS. STATS., seriously interferes with appellees' fundamental right to marry, and therefore the District Court was correct to subject the statute to strict scrutiny.[7]

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[6] Lower courts have also recognized that the right to marry is protected under the Constitution. Keckeisen v. Independent School District 612, 509 F.2d 1062, 1065 (8th Cir. 1975), cert. denied, 423 U.S. 833, (1975); Pederson v. Burton, 400 F. Supp. 960, 962 (D.D.C. 1975); O'Neill v. Dent, 364 F. Supp. 565, 568-569 (E.D. N.Y. 1973); Holt v. Shelton, 341 F. Supp. 821, 822-823 (M.D. Tenn. 1972).

[7] As the District Court pointed out, the wealth discrimination inherent in the statute provides an additional justification for applying the strict scrutiny test. Although wealth discrimination alone is not a sufficient basis for applying strict scrutiny, classifications based on wealth have been strictly scrutinized and overturned in cases where the persons constituting the class discriminated against were, because of their poverty, completely unable to pay for a benefit and as a result were absolutely deprived of any opportunity to enjoy that benefit. See San Antonio School District v. Rodriquez, 411 U.S. 1, 20-22 (1973). The cases cited by the Court in Rodriguez share one other distinguishing factor: the benefits denied to indigent persons were extremely important in nature. See e.g., Griffin v. Illinois, 351 U.S. 12 (1956); Bullock v. Carter, 405 U.S. 134 (1972); Tate v. Short, 401 U.S. 395 (1971).
(footnote cont'd on next page)



The strict scrutiny test is demanding; the state bears the burden of showing that the statutory classification is necessary to promote a compelling state interest and that the statute is "narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, supra, 410 U.S. at 155. Appellants argued in the District Court that two state interests are promoted by the statute: providing counseling to emphasize the need to meet current support obligations, and protecting the welfare of those children which appellees have been ordered to support. It is apparent that neither state interest is sufficient to justify the statutory restriction on appellees' rights to marry[8] and appellants do not dispute this conclusion in their Jurisdictional Statement.

In fact, the statutory classification involved here could not be upheld under the less stringent rational relationship standard because it is not fairly and substantially related to any legitimate, articulated state purpose. San Antonio School District v. Rodriguez, supra, 411 U.S. at 17;

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(con't footnote 7)

All these characteristics are present with respect to Redhail and many other members of the appellee class who are unable to prove both compliance with the prior support order and that their children are not public charges. Because of their poverty, they are completely unable to enjoy the benefit of marriage, a benefit of unquestioned importance to which no satisfactory alternative is possible.

[8] Appendix of the Jurisdictional Statement, (hereafter "Ap."), pp. 15-17.

Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). Assuming arguendo that the State has a legitimate interest in providing counseling before marriage to persons with pre-existing support obligations, Sec. 245.10, WIS. STATS., does not require that appellees submit to counseling nor does it require the court hearing the petition for permission to marry to counsel the petitioner regarding his/her support obligations. The statutory requirements are limited to an examination of the petitioner's compliance with the support order and of his/her ability to provide enough support to prevent the children from becoming public charges. Indeed, the statute allows the court to waive the hearing if it is satisfied from court records, family support records, and the petitioner's financial disclosure that the statutory requirements are met. Since the hearing offers the only opportunity for counseling the marriage license applicant, allowing waiver of the hearing entirely defeats the state purpose allegedly promoted by the statute.

Nor does the statute rationally further the other purpose identified by the State, the protection of the welfare of children. The children of those persons who are granted permission to marry are simply not affected by the procedure their parents have been forced to undergo. Children of persons who are denied permission to marry, whether because the parent is behind in support payments or because the children are public charges, are also unaffected by the procedure. If permission to marry is denied, the back support will still be owing; the child will still receive public assistance. In order



to collect the unpaid support or to increase the amount of the support order, the child's custodian or the State must still resort to the statutory tools available under Wisconsin law.[9]

It might be argued that Sec. 245.10, WIS. STATS., promotes the welfare of children by preventing appellees from taking on new financial obligations through marriage. However, as the District Court pointed out, it is likely that many persons in the appellee class will improve their financial situation through marriage because their new spouse will be employed. Ap. 17. Furthermore, many people have children without benefit of marriage and are, of course, obligated to support those out-of-wedlock children. Often the only result of the statute is to deny expectant parents the right to marry and legitimate their child.[10] Far from promoting the welfare of children, the statute thus results in the unnecessary illegitimacy of children whose parents want very much to marry.

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[9]The lower court outlined the statutory means for enforcing support obligations at Ap. 16-17. In addition, both divorce courts and paternity courts are authorized to increase support orders as the circumstances of the parent allow. Sec. 247.25, WIS. STATS. (1973); Sec. 52.38, WIS. STATS. (1973).

[10]Appellee Redhail alleged in his complaint that he and the woman he wanted to marry were expecting a child. Complaint, Para. 19.

In summary, whatever standard is applied, Sec. 245.10, WIS. STATS., violates appellees' rights to equal protection of the law.[11]

## II. THIS IS NOT A PROPER CASE FOR ABSTENTION.

Appellants argue that federal courts should abstain in the area of domestic relations, at least in cases where the state court has not had the opportunity to decide the question of the constitutionality of the statute. In support, appellants cite Younger v. Harris, 401 U.S. 37 (1971); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); and Reetz v. Bozanich, 397 U.S. 82 (1970).

This Court has recently emphasized that abstention is an exception to the general rule that a federal court is obligated to adjudicate a controversy properly before it. Ex. Bd. of Eng., Arch., & Sur. v. Flores de Otero, _____U.S._____, 96 S.Ct. 2264, 2279 (1976); Colorado River Water Conser. Dist. v. U.S., 424 U.S. 800, 813-817 (1976).

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[11]Appellants urged the District Court to apply the "sliding scale" or "middle tier" equal protection approach. This standard requires that the statutory classification serve important governmental objectives and be substantially related to the achievement of those objectives. See, e.g., Reed v. Reed, 404 U.S. 71 (1971); Craig v. Boren, 45 U.S.L.W. 4057 (dec'd. 12/20/76). This court has not applied the middle tier test to classifications involving fundamental rights such as marriage and the District Court rejected it. Ap. 14. However, the District Court did point out that it is questionable whether the statute could be upheld using this analysis.
(footnote cont'd on page 12)



Abstention is appropriate in cases involving unsettled questions of state law, the resolution of which may make decision of the federal constitutional claim unnecessary, Lake Carriers Ass'n v. MacMullen, 406 U.S. 498 (1972), or is for some reason peculiarly within the province of state courts, Reetz v. Bozanich, supra. However, this case presents no unsettled question of state law. The statute is plain and unambiguous and appellants do not claim otherwise. "Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim." Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971). See also Zwickler v. Koota, 389 U.S. 241, 245-252 (1967).

Abstention is also appropriate in many cases where the exercise of federal jurisdiction would interfere with a pending state court action. Younger v. Harris, supra; Huffman v. Pursue, Ltd., supra. This doctrine of abstention is based on, "principles of equity, comity and federalism [which] 'have little force in the absence of a pending state proceeding.' " Steffel v. Thompson, 415 U.S. 452, 462 (1974). Younger and Huffman do not bar consideration of the merits of this case because no state proceeding is or ever has been pending.

Appellants also appear to propose that this Court require appellees to attempt to vindicate their claim in state court simply because the claim involves the regulation of marriage. This is a

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(cont'd footnote 11)

Ap. 15. The classification is not substantially related to the achievement of any important governmental objective since there are numerous less restrictive means by which the interests involved can be furthered.

rather novel argument for which appellants cite no authority. Appellants are clearly correct in asserting that the regulation of marriage is purely a state function, but the state's power in the area of domestic relations, as in other areas, is limited by the Fourteenth Amendment. Loving v. Virginia, supra, 388 U.S. at 7. Congress has given the federal courts both the power and the duty to protect federal constitutional rights. Steffel v. Thompson, supra, 415 U.S. at 472. There is no reason, either in law or in logic, to exclude the important rights involved in marriage from this protection.

## III. DUE PROCESS DOES NOT REQUIRE NOTICE TO MEMBERS OF A RULE 23(b) (2) CLASS.

The final issue raised by appellants is whether due process requires that notice be given to members of a class if the judgment is to be binding upon them. The District Court certified this action as a class action on behalf of the appellee class and against the appellant class under Rule 23(b) (2) of the Federal Rules of Civil Procedure, and held that no prejudgment notice to either class was required.

Rule 23 does not by its terms require notice to all members of a (b) (2) class. Rule 23(d) (2), gives the court the authority to make orders for the protection of the class as fairness requires, including the authority to require notice to absent class members.

Although a split of authority did exist on the question of whether due process requires notice to absent members of a (b) (2) class in all cases, Ap. 7, recent decisions of this Court and the circuit courts have substantially resolved the issue.



In Eisen v. Carlisle and Jacquelin, 417 U.S. 156 (1974), this Court discussed the notice requirements of Rule 23(c) (2) in Rule 23(b) (3) class actions. Although due process standards were discussed, this Court's decision that individual notice must be sent, at plaintiff's expense, to all identifiable class members was firmly based on the language and history of Rule 23 itself. Id. at 173-179. The Court also limited its decision to actions brought under Rule 23(b) (3), expressly excluding (b) (2) actions. Id. at 177, n. 14.

Sosna v. Iowa, 419 U.S. 393 (1975), involved a (b) (2) class action. This Court did not require notice to absent class members, stating that the problems associated with (b) (3) actions and considered in Eisen were not present. Id. at 397, n. 4. The Court later pointed out that all class members would be bound by the judgment. Id. at 403. Eisen and Sosna, read together, require the conclusion that this Court does not intend to impose a blanket requirement of notice to absent class members in all types of representative actions.

A number of circuit courts have held that, in light of Eisen and Sosna, notice is not required in class actions brought under (b) (1) and (b) (2). Frost v. Weinberger, 515 F. 2d 57, 65 (2d Cir. 1975), cert. denied, 424 U.S. 958 (1976); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 254-257 (3rd Cir. 1975), cert. denied, 421 U.S. 1011 (1975); United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 878-879 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976); Molina v. Weinberger, No. 74-1611 (9th Cir. Oct. 1, 1975), Slip Opinion 11-14; Larinoff v. United States, 533

F.2d 1167, 1184-87 (D.C. Cir. 1976)[12]
The Seventh Circuit, which held in Schrader v. Selective Service System Local Board No. 76, 470 F.2d 73, 75 (7th Cir.) cert. denied, 409 U.S. 1085 (1972), that notice is required in all representative actions, has questioned this decision in light of Eisen. Bijeol v. Benson, 513 F.2d 965, 968 n. 3 (7th Cir. 1975). The Sixth Circuit now stands alone in stating that due process does require notice to class members in all representative proceedings. Zeilstra v. Tarr, 466 F.2d 111 (6th Cir. 1972). And the validity of the Zeilstra decision is at best unclear. Because the Court decided that the District Court lacked subject matter jurisdiction, this statement was clearly dictum and is not uniformly followed by district courts within the Sixth Circuit. See e.g., Watson v. Branch County Bank, 380 F. Supp. 945, 956-960 (W.D. Mich., S.D. 1974). Appellees are not aware of any reported cases in which the Sixth Circuit re-examined or reaffirmed this position. And the Sixth Circuit relied in Zeilstra upon the now questioned Seventh Circuit decision in Schrader v. Selective Service System Local Board No. 76, supra,

[12]See also Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972) and Gilbert v. General Electric Co., 519 F.2d 661 (4th Cir. 1975), rev'd on other grounds, 45 U.S.L.W. 4031 (dec'd. 12/7/76), which hold that notice is not required in (b) (2) class actions based on the language of Rule 23 and Ryan v. Shea, 525 F.2d 268, 275 (10th Cir. 1975), which discusses the issue but does not decide it.



and on the Second Circuit's decision in Eisen v. Carlisle and Jacquelin, 391 F.2d 555, 564-565 (2d Cir. 1968), on remand, 52 F.R.D. 253 (S.D. N.Y. 19710, 54 F.R.D. 565 (S.D. N.Y. 1972) rev'd. 479 F.2d 1005 (2d Cir. 1973), vacated, 417 U.S. 156 (1974). However, the Second Circuit held in Frost v. Weinberger, supra, that its statement with regard to notice in Eisen does not apply to (b) (2) actions.

In light of the above authority, it is clear that the District Court was correct in holding that due process does not require notice to (b) (2) class members in all cases. Moreover, the District Court was correct in finding that no special circumstances existed in this case which required notice to members of either class under Rule 23(d) (2), The District Court found that the representation of the interests of both classes was fair and adequate and especially noted the participation of the Attorney General of Wisconsin as an important element in protecting the interests of the defendant class of county clerks. The Court specifically found intervention by members of either class to be unnecessary. Ap. 6, 9. These findings are clearly correct and appellants do not appear to dispute them. Therefore, the District Court's decision on the class issues should be affirmed.

## IV. THIS COURT SHOULD SUMMARILY AFFIRM THE JUDGMENT OF THE DISTRICT COURT.

This appeal presents no questions substantial enough to warrant further review by this Court. The abstention issue raised by appellants is without merit. Sec. II, supra. The issue of notice to (b) (2)

class members, although formerly a subject of controversy among the circuits, has now been resolved. Sec. III, supra. On the merits of the constitutional claim, the District Court did no more than apply well-established equal protection analysis to a statutory classification which unquestionably conflicts with a fundamental, constitutionally protected right. Sec. I, supra. Appellants do not cite nor are appellees aware of any decisions of this Court or of lower federal courts which conflict with the judgment of the District Court in this case.

Furthermore, the merits of the constitutional claim involve a statute which is peculiar to the State of Wisconsin. To appellees' knowledge, no other state has enacted legislation similar to Sec. 245.10, WIS. STATS. (1973). Therefore, this appeal does not affect in any way the rights of persons who are not before the Court, nor will summary affirmance deprive lower federal courts of guidance in similar cases.



## CONCLUSION

For the foregoing reasons, appellees respectfully move this Court to summarily affirm the judgment of the District Court.

Respectfully submitted,

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